Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC	)	**EB Docket No. 11-71** **File No. EB-09-IH-1751** **FRN: 0013587779**
	)	
Participant in Auction No. 61 and Licensee of Various Authorizations in the Wireless Radio Services	)	
	)	
Applicant for Modification of Various Authorizations in the Wireless Radio Services	)	
	)	
Applicant with ENCANA OIL AND GAS (USA), INC.; DUQUESNE LIGHT COMPANY; DCP MIDSTREAM, LP; JACKSON COUNTY RURAL MEMBERSHIP ELECTRIC COOPERATIVE; PUGET SOUND ENERGY, INC.; ENBRIDGE ENERGY COMPANY, INC.; INTERSTATE POWER AND LIGHT COMPANY; WISCONSIN POWER AND LIGHT COMPANY; DIXIE ELECTRIC MEMBERSHIP CORPORATION, INC.; ATLAS PIPELINE – MID CONTINENT, LLC; DENTON COUNTY ELECTRIC COOPERATIVE, INC., DBA COSERV ELECTRIC; AND SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY	)	**Application File Nos. 0004030479, 0004144435, 0004193028, 0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 0004417199, 0004419431, 0004422320, 0004422329, 0004507921, 0004153701, 0004526264, 0004636537, and 0004604962**
	)	
For Commission Consent to the Assignment of Various Authorizations in the Wireless Radio Services	)	

To: The Commission

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

By their attorneys and pursuant to Section 1.106 of the rules and regulations of the Federal Communications Commission ("Commission"),[1] Atlas Pipeline Mid-Continent, LLC ("Atlas");[2] DCP Midstream, LP ("DCP"); Denton County Electric Cooperative, Inc. d/b/a CoServ Electric ("CoServ"); Dixie Electric Membership Corporation, Inc. ("DEMCO"); Enbridge Energy Company, Inc. ("Enbridge"); EnCana Oil & Gas (USA) Inc. ("Encana");[3] Interstate Power and Light Company ("IPL"); Jackson County Rural Electric Membership Cooperative ("Jackson County REMC");[4] and Wisconsin Power and Light Company ("WPL"), hereby submit this Petition for Reconsideration ("Petition"). All the petitioners are Critical Infrastructure Industry ("CII") companies and are collectively referred to herein as the "*CII Petitioners*." The *CII Petitioners* respectfully request that the Commission reconsider a limited

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[1] 47 C.F.R. § 1.106 (2010). Pursuant to Section 1.106(a)(1) of the Commission's Rules, a "petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." Of the 12 CII assignment applications designated for hearing in the HDO, the Commission singled out, without explanation for the disparate treatment, only one applicant, the Southern California Regional Rail Authority ("Metrolink"). In so doing, the Commission provided only Metrolink with the opportunity to demonstrate how the public interest would be served by removing its application from the ambit of the hearing. HDO at *fn.* 7. As detailed herein, this ruling is adverse to the *CII Petitioners'* participation in the hearing under Section 1.106(a)(1) not only because the Commission arbitrarily provided Metrolink an opportunity it did not provide the *CII Petitioners*, but also because the *CII Petitioners'* actions are not questioned and their participation as named parties is not required to resolve the issues raised in the HDO. As a result, the *CII Petitioners* meet the eligibility requirements for filing a Petition for Reconsideration as set forth in the Commission's Rules. Should the Commission determine that this Petition is somehow not authorized under the Commission's Rules, the *CII Petitioners* respectfully request that the Petition be considered an informal request for relief under Section 1.41. *Id.*, at *§ 1.41.* To the extent necessary, *CII Petitioners* seek a waiver of any FCC rules that limit their right or ability to file the Petition. *Id.* at § 1.925.

[2] The correct name of the entity is Atlas Pipeline Mid-Continent LLC.

[3] The correct name of the entity is EnCana Oil & Gas (USA) Inc.

[4] The correct name of the entity is Jackson County Rural Electric Membership Cooperative.

aspect of its Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing ("HDO") released in the above-captioned proceeding on April 19, 2011.[5]

Each *CII Petitioner* separately entered into an agreement with Maritime Communications/Land Mobile, LLC ("Maritime") in good faith and for fair market value to acquire, upon Commission grant of its above-captioned assignment and partition application(s), portions of Maritime's Automated Maritime Telecommunications Service ("AMTS") license(s) issued under call signs WQGF 316 or WQGF 317. The *CII Petitioners* urge the Commission to afford them the same opportunity afforded to the Southern California Regional Rail Authority ("Metrolink"), another CII company and applicant to this proceeding, to show that their applications, too, should be removed from the ambit of the HDO.[6] The *CII Petitioners* are critical infrastructure companies similarly situated to Metrolink and request that the full Commission promptly grant their applications, with appropriate safeguards discussed below, so that the *CII Petitioners* may use these frequencies consistent with their transactions with Maritime and in furtherance of the public interest.

If the Commission is unable to grant this Petition by June 15, 2011, the date of the prehearing conference, the *CII Petitioners* request that the Commission stay the hearing insofar

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[5] *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (*rel.* Apr. 19, 2011) ("HDO"). In the hearing proceeding, the qualifications of Maritime Communications/Land Mobile, LLC ("Maritime") to remain a Commission licensee will be adjudicated. In the HDO, the Commission also stated it would dismiss pending applications with prejudice for any proposed assignee that failed to timely file a Notice of Appearance. All of the *CII Petitioners* duly entered timely Notices of Appearance.

[6] *Id.* at *fn* 7.

as the *CII Petitioners'* assignment applications are concerned.[7] Since the Petition seeks the removal of *CII Petitioners* and their respective applications from the hearing, no purpose would be served by requiring them to appear and participate in the hearing until the Petition is resolved and their status as parties is clarified by the Commission. Even if the hearing is stayed with respect to the *CII Petitioners*, this proceeding could continue with respect to the primary issues designated in the HDO regarding Maritime's qualifications as a licensee.

I. SUMMARY

On August 18, 2009, the Enforcement Bureau issued Letters of Inquiry to Maritime, MariTEL, Inc., Wireless Properties of Virginia, Inc., and others ("Target Companies") pursuant to Section 308 (b) of the Communications Act seeking information related to the ownership and control of these entities. The Enforcement Bureau did not send similar letters to any of the *CII Petitioners*, and the HDO contains no allegations implicating any of the *CII Petitioners* in any alleged wrongdoing.[8]

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[7] Concurrent herewith, the *CII Petitioners* are filing with the Honorable Richard L. Sippel, Chief Administrative Law Judge and Presiding Officer in the instant hearing proceeding, a Motion to Hold Hearing in Abeyance.

[8] On January 21, 2011, several of the *CII Petitioners* – DEMCO, DCP Midstream, Enbridge and Encana – along with the National Rural Electric Cooperative Association (NRECA) and the National Rural Telecommunications Cooperative (NRTC), sent a letter to the Chief, Wireless Telecommunications Bureau, requesting that their pending assignment applications be granted notwithstanding the Enforcement Bureau's pending investigation of Maritime and related entities. The letter explained that the signatories possessed no knowledge of, and took no position regarding, the merits of the Enforcement Bureau's investigation of Maritime but requested that the assignment applications be granted promptly because of the important safety implications and public interest benefits incident to operations in the electric utility and oil and gas industries. On April 5, 2011, the same parties sought the same relief in a similar letter to the Chairman and the Commissioners. The Commission responded to neither letter. Instead, on April 19, 2011, the Commission issued the HDO.

During the course of the Enforcement Bureau's investigation, the *CII Petitioners* and Maritime duly filed assignment applications and associated lease notifications with the Wireless Telecommunications Bureau regarding their individual transactions. The assignment applications remain pending before the Commission in light of the HDO.

As discussed below, the *CII Petitioners* are relying on these frequencies to support critical infrastructure applications in the electric utility and oil and gas industries. Some of the *CII Petitioners* already have constructed and are operating systems on these frequencies pursuant to the Commission's rules governing spectrum leases.[9]

Unfortunately, in the HDO, the Commission did not treat all of Maritime's proposed assignees equally. Footnote 7 of the HDO provides:

> On March 11, 2010, Maritime and Southern California Regional Rail Authority ("Metrolink," and together with Maritime, the "Parties") sought Commission consent to assign certain spectrum. Metrolink has represented that it plans to use such assigned spectrum to comply with the Rail Safety Improvement Act of 2008. This law requires, among other things, that by 2015, passenger trains implement positive train control systems and other safety controls to enable automatic braking and to help prevent train collisions. Given the potential safety of life considerations involved in the positive train control area and therefore attendant to the Metrolink application, we will, upon an appropriate showing by the Parties, consider whether, and if so, under what terms and conditions, the public interest would be served by allowing the Metrolink application to be removed from the ambit of this Hearing Designation Order.[10]

With no further discussion in the HDO, the Commission singled out Metrolink from among the 12 pending CII assignment applications seeking spectrum from Maritime, and

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[9] 47 C.F.R. § 1.9020(e)(ii) (2010), permitting Lessees to commence operations 21 days after filing a long-term Spectrum Manager Lease.

[10] HDO at *fn* 7 (internal citations omitted).

allowed Metrolink – and only Metrolink – to demonstrate why its application should be removed from the hearing process. Although the *CII Petitioners* also desperately require the use of these frequencies for safety of life and other critical public interest considerations, they were not afforded the same opportunity as Metrolink to be removed from the hearing.

The *CII Petitioners* support the removal of Metrolink from the hearing. No CII entity should be denied access to these frequencies under these circumstances. There is no basis in the record or otherwise, however, for treating Metrolink, a railroad recognized as a CII company under the Commission's rules, differently from the *CII Petitioners*, which are electric utilities and oil and gas companies also recognized as CII companies under the Commission's rules.[11]

Accordingly, the *CII Petitioners* urge the Commission to treat all similarly situated critical infrastructure entities in the same manner and to allow the *CII Petitioners* to demonstrate why potential safety of life considerations and the public interest necessitate that their applications also should be removed from the hearing process and promptly granted. As discussed herein, the *CII Petitioners'* actions are not in question and their participation as named parties is not required to resolve the issues to be adjudicated in the hearing.

II. THE *CII PETITIONERS'* APPLICATIONS AND SPECTRUM USE

All of the *CII Petitioners* entered into arm's length, good faith business transactions with Maritime because they desperately need access to Maritime's AMTS spectrum to support critical infrastructure communications functions. These critical functions include Supervisory Control and Data Acquisition ("SCADA") related to the operation of pipelines and liquefied natural gas ("LNG") facilities in the oil and gas industry, as well as smart grid and other CII functions in the

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[11] 47 C.F.R. § 90.7 (2010).

electric utility industry. For electric utilities, control and operations of transmission and distribution infrastructure are mandated by the Federal Energy Regulatory Commission to achieve nationwide stability and system reliability. The *CII Petitioners'* operations are conducted on a private (noncommercial) basis and are essential to the safe and efficient operation of inherently dangerous, public-safety related CII businesses previously recognized as such by the Commission.

A. Proposed Use of Spectrum by Oil and Gas Companies

Approximately two-thirds of the energy supply in the United States is transported through pipelines.[12] There are roughly 170,000 miles of hazardous liquid pipelines, 295,000 miles of gas transmission pipelines and 1.9 million miles of gas distribution pipelines in the United States.[13] Pipelines covering thousands of miles must have equipment throughout the pipeline to control the movement of the commodity, including pumps and compressors to provide force and valves to control pressure or change position to direct the commodity flow.[14] Pressure, flow and equipment are customarily monitored and remotely controlled wirelessly by personnel in central control rooms often miles away from the pipeline. This monitoring serves both commercial and safety purposes.

In 2009, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a final rule amending the pipeline safety regulations governing control room management for pipelines where controllers use SCADA systems.[15] This final rule mandated that by August 1,

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[12] 74 Fed. Reg. 63311 (Dec. 3, 2009).

[13] *Id.*

[14] *Id.*

[15] *Id.*

2011, operators develop control room management procedures and that they implement those procedures by February 1, 2012.[16]

Enbridge. Enbridge intends to use these AMTS frequencies to upgrade its SCADA system and control room to comply with this PHMSA mandate. Enbridge is an indirect wholly-owned subsidiary of Enbridge Inc. Enbridge Inc. indirectly owns and operates natural gas gathering, treating, processing and transmission systems as well as marketing and trucking operations throughout Oklahoma, Texas, Louisiana, Mississippi and Alabama. These systems gather natural gas from the wellhead, treat and process the gas for delivery into intrastate or interstate pipelines for transmission to wholesale customers such as power plants, industrial customers and local distribution companies. Enbridge filed its assignment application to acquire a portion of AMTS spectrum on November 19, 2010.[17]

Atlas. Like Enbridge, Atlas is reliant on this AMTS spectrum to comply with federal law. Atlas owns and operates gas-processing plants, a treating facility and three significant gas gathering pipeline systems throughout Oklahoma, southern Kansas, eastern Tennessee and western Texas. Atlas filed its assignment application on March 2, 2011.[18]

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[16] *Id.*

[17] *See* FCC File Number 0004430505. The data acquired through Enbridge's system is centralized in a control room where personnel view data from the system in real-time, are able to adjust commodity flow and promptly respond to warning signs indicating a potential emergency. Commands from the control room may be transmitted to remotely controlled equipment and relayed to field personnel to coordinate a prompt response to potential emergency situations. To date, Enbridge has spent more than $150,000 to engineer and plan the deployment of its system and has no alternative spectrum available to upgrade its SCADA system to comply with the PHMSA deadlines for control rooms.

[18] *See* FCC File Number 0004526264. Like Enbridge, these AMTS frequencies will enhance Atlas' SCADA system, which has historically experienced significant interference. Atlas plans to use the AMTS system to monitor and record performance of certain compressor stations to maintain compliance with new Environmental Protection Agency ("EPA") environmental

DCP. DCP is headquartered in Denver, Colorado and is a joint venture between Spectra Energy and ConocoPhillips. DCP is the largest natural gas liquids ("NGL") producer in the nation, one of the largest NGL marketers and a leading natural gas gatherer and processor. DCP's partition application was filed with the Commission on August 19, 2010.[19]

Encana. Encana is an indirect wholly-owned subsidiary of EnCana Corp., which is among the largest natural gas companies in North America. Encana is focused on natural gas exploration and resource development and currently has an interest in approximately 3.5 million net acres of land in the U.S., and key natural gas gathering and processing assets primarily in Colorado, Wyoming, Texas, Louisiana and Utah. Encana filed its first application on November 13, 2009 and its second application on April 7, 2011.[20]

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monitoring standards. 40 C.F.R. §§ 63.1 *et seq* (2010). *See also Mandatory Greenhouse Gas Reporting Rule and National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines*, Final Rule, 75 Fed. Reg. 51570 (Aug. 20, 2010). Atlas is currently implementing devices operating on the AMTS frequencies for each compressor and engine affected by the new EPA standards to automate the monitoring and recording requirements via the SCADA system's ability to capture historical environmental key process indicators on each engine. 40 C.F.R. § 63.10 (2010). In addition to helping Atlas comply with federal law, the AMTS spectrum will allow the company to monitor the pipeline with minimal unscheduled downtime, enhance leak detection and significantly decrease the likelihood of an explosion. Atlas' system occasionally contains gas with dangerous quantities of Hydrogen Sulfide (H_2S), which can cause injury or death with exposure. The system may also contain high quantities of oxygen (O_2), which can lead to corrosion. The SCADA system allows Atlas to monitor the H_2S levels and O_2 concentration, provides prompt warnings when dangerous levels are present allowing personnel time to prevent harmful exposure and corrosion. To date, Atlas has expended nearly $150,000 to deploy the AMTS spectrum.

[19] *See* FCC File Number 0004354053. Like Atlas and Enbridge, DCP intends to use the AMTS spectrum to operate a SCADA System to support the company's operations in west Louisiana and thereby ensure compliance with the same federal mandates.

[20] *See* FCC File Numbers 0004030479 and 0004604962. Pursuant to leases with Maritime covering the AMTS spectrum, Encana has developed a reliable SCADA network for its gas wells in Texas and Louisiana with an eye toward further expansion into East Texas. Before acquiring this AMTS spectrum, Encana operated a Spread Spectrum SCADA system. Under the FCC's

B. Proposed Use of Spectrum by Electric and Gas Utilities

Electric utilities, like the oil and gas companies, are dependent on this AMTS spectrum to increase system automation, reliability, safety and efficiency. With substantial support from the Commission and others in the federal government, electric utilities across the country are implementing smart grid and other advanced communications systems and are becoming progressively more dependent on automation to provide critical services. Spectrum is a key component in developing, deploying and operating these advanced systems. In support of the trend toward automation, the Commission dedicated an entire chapter of its National Broadband Plan to spectrum options in support of smart grid deployment.[21] The federal government as a whole has invested billions of dollars in private companies, utilities, manufacturers and cities to aid in smart grid deployment.[22]

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rules, these operations are unlicensed and the operator must not cause harmful interference to other users and must accept interference from an authorized radio station, another intentional or unintentional radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator. 47 C.F.R. § 15.9(b). Safety and reliability were major concerns because the frequencies in this system were unmanaged and Encana frequently experienced interference. The critical nature of reliable gas flow control, data collection and monitoring of gas wells caused Encana to acquire AMTS spectrum and deploy a more reliable SCADA System on licensed AMTS frequencies. Environmental, health and safety issues are impacted by the reliability of Encana's SCADA network. Like Enbridge, Encana carefully monitors its wells from a central control room where Encana's personnel can remotely shut in a well to prevent spills. The SCADA system also monitors well pressure and temperature to detect potential problems and prevent gas emissions or spills. Surface casing pressures are monitored centrally to detect any leaks that may occur. Many of the facilities operated and monitored by Encana are wells located in or near residential areas. Encana has invested nearly $4 million to deploy its SCADA system.

[21] The National Broadband Plan is available at http://www.broadband.gov/plan/ (last visited, May 18, 2011).

[22] *See President Obama Announces $3.4 Billion Investment to Spur Transition to Smart Energy Grid*, available at http://www.energy.gov/8216.htm ((last visited May 13, 2011).

CoServ. CoServ, a Texas electric cooperative corporation headquartered in Corinth, Texas, provides electric service to more than 130,000 member-owners across six counties in the Dallas-Fort Worth Metroplex. CoServ filed its assignment application on March 11, 2011.[23]

DEMCO. DEMCO is a rural electric cooperative providing electric service to more than 97,000 locations throughout seven rural parishes in Louisiana. DEMCO's electric distribution system includes 10 metering points for wholesale power and 40 substations for system reliability. The electric system is continuously monitored by its SCADA system to detect system failures. In 2009, DEMCO maintained over 9,533 miles of energized lines: 227 miles of transmission facilities, 6,574 miles of overhead construction and 2,732 miles of underground cable. The DEMCO region served as a staging area during Hurricane Katrina, providing assistance to many federal and state agencies. DEMCO filed its partition application to acquire a portion of Maritime's AMTS spectrum on December 8, 2010.[24]

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[23] *See* FCC File Number 0004636537. CoServ is currently licensed to operate Land Mobile Radio ("LMR") facilities to support daily utility operations and emergency response activities in meeting the service needs of these member-owners. CoServ's existing LMR system is nearing its end of life and must be upgraded and/or replaced. CoServ has spent more than $100,000 to plan its deployment of this next generation AMTS communications system.

[24] *See* FCC File Number 0004507921. DEMCO's existing channels do not provide enough capacity for emergency operations even during small outages. When power outages occur as a result of inclement weather or natural or manmade disasters, sometimes leaving thousands or tens of thousands of people without power, restoring power to every person, home, hospital, care center, government office and business is a public safety emergency. During such emergency operations DEMCO's workforce, which under normal operations has about 220 employees, will increase in size by an additional 600 to 2600 workers, depending on the size of the emergency. Maintaining reliable and secure communications during such emergency response conditions is of ultimate import to the safety of DEMCO's work force and customers. It is at those very times that commercial communications alternatives become unavailable due to outages of the commercial grade networks. The AMTS spectrum applied for is necessary for DEMCO to expand its existing network in order to satisfy its current needs. To date, DEMCO has spent $3 million on licensing and equipment for operation on 220 MHz spectrum.

IPL and WPL. IPL and WPL were established as a result of the 1998 merger of three separate utilities – WPL, Interstate Power Company ("IPC") and IES Utilities, Inc. ("IES"). In January 2002, IPC and IES merged to form IPL. IPL and WPL offer electric, gas and steam services to over 1.3 million customers across more than 50 counties covering approximately 54,000 square miles of primarily rural territory in Iowa, Wisconsin, Minnesota and Illinois. The companies provide over 30 million megawatt-hours of electric service and over 100 million dekatherms of natural gas annually to its customers. IPL and WPL filed their applications on December 1, 2010.[25]

Jackson County REMC. Jackson County REMC entered into an agreement with Maritime on April 27, 2010 to purchase AMTS spectrum to replace an existing radio system used to operate and control the company's aging SCADA system. The AMTS frequencies are necessary because Jackson County REMC's existing radio system equipment has reached its

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[25] *See* FCC File Numbers 0004419431 and 0004417199. IPL's and WPL's proposed acquisition will allow the companies to enhance their abilities to provide safe, efficient, reliable and environmentally responsible energy services. Their use of the spectrum will enhance the data capabilities of their networks consistent with Federal government initiatives to promote SCADA and Smart Grid technologies. WPL's first efforts to implement Smart Grid technologies involved the installation of over 455,000 electric and gas smart meters as part of an Advanced Metering Infrastructure ("AMI"). These meters are polled remotely at frequent intervals via a fixed radio frequency network (on non-AMTS channels) that retrieves and transmits customer energy usage information to a data center where it is used for, among other things, load research, delivery system planning, customer information and billing, and power outage management. The acquisition of AMTS spectrum will enhance the implementation of smart grid technologies. In particular, the AMTS channels will provide two-way data communications capabilities to support real-time monitoring and optimization of the capacitor banks at substations. This project will initially involve up to 700 capacitor banks and possibly as many as 2000. The estimated cost of the system is $6.8 million, which is being partially funded by a $3.2 million grant awarded by the Department of Energy under the American Recovery & Reinvestment Act of 2009. IPL and WPL, like certain other *CII Petitioners*, will also use AMTS channels to support SCADA functions, including, among others, safely and efficiently controlling the transmission and distribution of electricity. The companies estimate that they will expend approximately $15 million to deploy the AMTS channels for these purposes.

limitations and the company is constantly seeking to improve reliability, responsiveness, and safety aspects of its power line system. Jackson County REMC filed its assignment application on July 6, 2010.[26]

C. Lack of Available Spectrum Options for CII Operations

All of the *CII Petitioners* sought to acquire AMTS spectrum because they found no other viable spectrum options available to satisfy their critical requirements. If the lessons of September 11th and Hurricane Katrina have shown us anything, it is the need for critical infrastructure industries to have access to reliable and secure communications over a hardened network during times of emergency to allow response activities essential to protecting safety and restoring service. Unfortunately, over time, the Commission has reallocated large amounts of fixed service bandwidth away from the critical infrastructure industry to other services. As a result of these actions, there currently is a dearth of channels available to satisfy the *CII Petitioners'* critical needs.[27]

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[26] *See* FCC File Number 0004310060. The SCADA system is an integral component of Jackson County REMC's overall operations. It provides real-time monitoring and notification of abnormal events that may occur on the power line system along with remote control ability of certain equipment which has led to increased reliability and decreased outage restoration times. The ability to remotely operate equipment has significantly enhanced the safety of Jackson County REMC's power line system both for the general public and its employees. Being able to promptly de-energize a section of line in the event of a vehicle accident or when employee safety is a concern is a valuable asset that would be compromised without the AMTS spectrum. Jackson County REMC already has invested approximately $100,000 in equipment and labor to implement this system.

[27] *See, e.g.,* Comments of the Utilities Telecom Council, RM-11429 (June 26, 2008). "The smart grid necessitates even more reliance on internal communications and IT networks than utilities already have, especially for data transmission. Much of the communication will be wireless; however, the critical infrastructure industries currently have no RF spectrum access to accommodate these needs."

For example, the entire 2 GHz band, once the mainstay of long-haul Private Operational Fixed Microwave Services, is now allocated to Personal Communications Services, Advanced Wireless Services and Mobile Satellite Services.[28] Many former 2 GHz users tried to relocate to the 4 GHz and 6 GHz bands, the next-best options for long-haul links, but satellite earth stations, which are routinely coordinated and licensed for the entire band and satellite arc, block many coordination efforts in those bands. Fixed service coordination at 4 GHz has become all but impossible nationwide, due to the proliferation of registered receive-only satellite dishes. Uplink earth station congestion has made the lower 6 GHz band largely unavailable in and near major population centers, where the need for fixed service communications is greatest.

For these and other legitimate concerns, the *CII Petitioners* turned to the AMTS band and are seeking to acquire vital spectrum from Maritime to support their critical infrastructure operations. Relying on the Commission's secondary markets procedures, some *CII Petitioners* already have deployed systems on these frequencies pursuant to spectrum leases. All of the *CII Petitioners* have invested in good faith to acquire this spectrum, engineer their systems and deploy them in furtherance of critical functions.

D. Grant of the *CII Petitioners'* Applications Will Promote Compliance With Federal Law and is Consistent with Commission Objectives

The Commission afforded Metrolink an opportunity to extract itself from the hearing because of potential safety of life considerations and because of its purchase of AMTS spectrum to comply with a federal mandate for Positive Train Control.[29] As discussed above, the *CII*

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[28] *See* 47 C.F.R.§ 101.69 (preamble) (reallocation of 1850–1990, 2110–2150, 2160–2200 MHz to PCS, AWS, MSS) (2010).

[29] *See Rail Safety Improvement Act of 2008*, Pub. L. No. 110-432, filed Oct. 16, 2008, 122 Stat. 4848, 4856-57 § 104(a)(2008).

Petitioners have similar safety of life considerations and federal requirements that also led them to acquire AMTS spectrum, yet their concerns were perhaps inadvertently not recognized by the Commission in the HDO.

For example, the PHMSA's rules require companies operating LNG facilities to have two reliable forms of communications that are not dependent upon each other at its facilities.[30] In addition, the PHMSA requires each operator of a pipeline facility[31] to have a communication system that provides for the transmission of information needed for the safe operation of its pipeline system.[32] The communications system must, at a minimum, (1) monitor operational data, (2) receive notices from personnel, the public and public authorities of any abnormal/emergency conditions, (3) provide two-way vocal communications between a control center and the scene of any abnormal/emergency situation, and (4) communicate with fire, police, and other appropriate public officials during emergency conditions.[33]

Similarly, electric utilities are implementing smart grid and other advanced communications systems with the support of, and pursuant to directives from, the federal government. The Commission has held workshops focusing on smart grid deployment,[34] federal

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[30] *See* 49 C.F.R. § 193.2519 (2010). This rule requires each LNG plant to have a primary communication system that provides verbal communication between plant personnel and plants with storage capacity in excess of 70,000 gallons to have a second communication system capable of providing verbal communications in the event of an emergency.

[31] A pipeline facility is any new or existing pipe, rights-of-way and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide. 49 C.F.R. § 195.2 (2010).

[32] 49 C.F.R. § 195.408(a) (2010).

[33] *Id* at.§ 195.408(b).

[34] For example, as the Commission was preparing the National Broadband Plan, it held a three-hour workshop on August 25, 2009, to discuss Smart Grid, Broadband and Climate change. *See*

smart grid loans and grants have been awarded throughout the country, and the National Broadband Plan itself addresses communications requirements necessary to support smart grid technologies.[35]

Grant of the *CII Petitioners'* applications also will ensure that homeland security efforts can be supported consistent with Federal objectives. In an Executive Order establishing a Critical Infrastructure Protection Board following the events of September 11, 2001, then-President Bush stated:

> The information technology revolution has changed the way business is transacted, government operates, and national defense is conducted. Those three functions now depend on an interdependent network of critical information infrastructures. The protection program authorized by this order shall consist of continuous efforts to secure information systems for critical infrastructure, including emergency preparedness communications, and the physical assets that support such systems. Protection of these systems is essential to the telecommunications, ***energy,*** financial services, manufacturing, water, transportation, health care, and emergency services sectors.[36]

Furthermore, the Federal government has advised utilities, oil and gas companies and other critical infrastructure industries that physical plants, operations centers, and command/control infrastructures are known terrorist targets. The continued ability to provide core energy services to the public, as well as to the hundreds of federal, state, and municipal

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also Comment Sought on the Implementation of Smart Grid Technology, Public Notice, DA 09-2017 (rel. Sept. 4, 2009).

[35] *National Broadband Plan* at Ch. 12 (available at http://download.broadband.gov/plan/national-broadband-plan-chapter-12-energy-and-environment.pdf) (last visited May 18, 2011).

[36] Executive Order, President George W. Bush through the Office of the White House Press Secretary, Critical Infrastructure Protection in the Information Age (Oct. 16, 2001), at Section 1(a)(emphasis added).

government entities, is essential to the public interest. These communications systems must remain reliable and secure, especially during emergencies when public safety is affected. In fact, Section 1016 of the USA PATRIOT Act declared the Federal government policy to be:

> any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable and minimally detrimental to the economy, human and government services, and national security of the United States[37]

This need for independent, security-related communications capabilities of private networks—such as those operated by the *CII Petitioners*—was emphasized in a February 2003, White House Report, *The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets* ("Report"). The Report states:

> In addition to the [Public Switched Telephone Network] and the Internet, enterprise networks are an important component of the telecommunications infrastructure. Enterprise networks are dedicated networks supporting the voice and data needs and operations of large enterprises . . . Because of growing interdependencies among the various critical infrastructures, a direct or indirect attack on any of them could result in cascading effects across the others. Such interdependencies increase the need to identify critical assets and secure them against both physical and cyber threats. Critical infrastructures rely upon a secure and robust telecommunications infrastructure. Redundancy within the infrastructure is critical to ensure that single points of failure in one infrastructure will not adversely impact others. It is vital that government and industry work together to characterize the state of diversity in the telecommunications architecture. They must also collaborate to understand the topography of the physical components of the architecture to establish a foundation for defining a strategy to ensure physical and logical diversity.[38]

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[37] *See* Critical Infrastructures Protection Act of 2001, PL 107-56, October 26, 2001, 115 Stat 272.

[38] *Report*, at pp. 47 & 49 (emphasis added).

In addition to these federal requirements and others, the Commission itself has established a nonnegotiable deadline of January 1, 2013,[39] for many private radio licensees to convert to narrower bandwidths or terminate operations on certain frequencies. Some of the *CII Petitioners* are relying on access to the AMTS spectrum being acquired from Maritime to satisfy their communications requirements as an alternative to mandatory narrowbanding.

The *CII Petitioners* seek AMTS spectrum from Maritime for public safety reasons and to comply with federal law, much like Metrolink. Even in the absence of such federal laws, granting the relief requested by the *CII Petitioners* (and Metrolink) is consistent with the Commission's objectives to support the communications needs of CII entities.[40] It is patently unfair and discriminatory for the Commission to allow a railroad to extract itself from this

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[39] 47 C.F.R. § 90.205(b)(5) (2010).

[40] *See generally* Federal Communications Commission, Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum from Federal, State and Local Emergency Response Providers, Submitted Pursuant to Public Law No. 108-458, 14 FCC Rcd 7772 (2005) ("December 2005 Report to Congress"). In its December 2005 Report to Congress, the agency stated that "[n]ew spectrum is needed . . . to allow effective radio communications during large-scale responses to major disasters; and to allow emergency response agencies to deploy next-generation communication technologies." These considerations apply equally to entities engaged in public safety-related activities, including CII providers. The FCC has recognized the complementary public safety role played by public service entities and the corresponding need for such entities to have access to spectrum to support that role. *See generally* Public Safety Wireless Advisory Committee, Final Report, App. A at 60 (Sept. 1996) ("One primary purpose of these [public service communications] networks is to minimize risk to the public. These networks also aid other public safety providers in performing their missions when a catastrophe does occur."); *Implementation of Sections 309(j) and 337 of the Communications Act*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22709, 22712 ¶ 5 (2000) ("...utilities...need reliable communications in order to prevent or respond to disasters or crises affecting their service to the public.").

hearing proceeding while not affording the same opportunity to electric utilities and oil and gas companies facing the same spectrum shortages and similar federal requirements.

III. THE COMMISSION MUST TREAT THE *CII PETITIONERS* AND METROLINK SIMILARLY

It is well settled that the Commission cannot lawfully treat similarly situated applicants disparately.[41] Having allowed Metrolink the opportunity to remove itself from the hearing, the Commission must accord the *CII Petitioners*, as similarly situated critical infrastructure applicants, the same treatment. The HDO provides no explanation for the disparate treatment afforded Metrolink, and none exists.

For years, the Commission has consistently recognized the similar needs of railroads and other critical infrastructure entities for access to vital spectrum necessary to support their operations and thereby protect safety of life and property. From the standpoint of spectrum requirements, the needs of electric utilities, oil and gas companies and railroads are virtually indistinguishable in the Commission's prior decisions. There is no legitimate basis at this late date for treating railroads differently than oil and gas companies and electric utilities for purposes of the HDO. Accordingly, Footnote 7 must be expanded on reconsideration to place the *CII Petitioners* on the same footing as Metrolink.

The *CII Petitioners*, like Metrolink, use internal radio services to protect safety of life, health and property, and do not make those services available to the public. All of the proposed assignees designated for hearing – Metrolink and the *CII Petitioners* alike – are identified as

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[41] *Melody Music, Inc. v. FCC, 120 U.S. App. D.C. 241, 345 F.2d 730 (D.C.Cir. 1965)*; *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

critical infrastructure industries under the Commission's rules.[42] All require the use of this spectrum to serve the public in times of emergency and other critical events involving the safety of life and property and to comply with applicable federal law.

There is no reasonable basis for treating Metrolink differently from the *CII Petitioners*. As consistently recognized by the Courts, "agency action cannot stand when it is so inconsistent with its precedent as to constitute arbitrary treatment amounting to an abuse of discretion."[43] In many prior rulings, the Commission has repeatedly and consistently recognized the similar nature of these spectrum users and has treated them similarly. Recognizing the similar needs of the railroads and the other critical infrastructure entities, the Commission historically has grouped these users together and assigned spectrum to these groups out of the same pool of frequencies.[44]

In adopting rules implementing Sections 309(j) and 337 of the Communications Act the Commission continued to group these entities together, recognizing that "*Congress deemed utilities, railroads, metropolitan transit systems and pipelines to be entities that protect the safety of life, health, or property for purposes of public safety radio services.*"[45]

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[42] 47 C.F.R. §90.7 (2010).

[43] *See Garrett v. FCC, at 1060 (quoting cases, internal quotes omitted).*

[44] *See, e.g., Improving Public Safety Communications in the 800 MHz band,* Report and Order, FCC 04-168 at *fn* 11 (rel. Aug. 6, 2004) ("Examples of CII licensees include 800 MHz systems that provide private internal radio services used by utilities, railroads, metropolitan transit systems [and] pipelines...").

[45] *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Safety Radio Pool in the Private Mobile Frequencies Below 800 MHz;* Petition for Rule making of the Mobile Telecommunications Association, WT Docket No. 99-87, Report And Order And Further Notice Of Proposed Rulemaking, 15 FCC Rcd 22709, at ¶ 80 (2000), emphasis added.

In that same proceeding, the Commission pointed to the Final Report of the Public Safety Wireless Advisory Committee ("PSWAC") in detailing the common characteristics of railroads and other CII users.[46] The PSWAC report states:

> Public service providers, such as transportation companies and utilities[,] rely extensively on radio communications in their day-to-day operations, which involve safeguarding safety and preventing accidents from occurring...[t]he Commission relied on a similar concept when it established special frequency coordination requirements for spectrum formerly used exclusively by the power, petroleum, and railroad industries because, in these industries, radio is used as a critical tool for responding to emergencies that could impact hundreds or thousands of people.[47]

In establishing service rules for the 4.9 GHz band, the Commission once again noted "*utilities, railroads, and similar entities may be directly involved in an emergency and may need to interact with the traditional public safety service providers.*"[48] Reiterating the similarity of the "power, petroleum and railroad industries" the Commission observed "*the nature of their day-to-day operations provides little or no margin for error and in emergencies they can take on an almost quasi-public safety function. Any failure in their ability to communicate by radio could have severe consequences on the public welfare.*"[49]

It is clear from prior Commission actions that the Commission has regarded the communications needs of all of the CII entities (including railroads, utilities *and* pipelines) to be similar in nature. Historically, this group of CII companies has been treated similarly by the

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[46] The Commission, jointly with the National Telecommunications and Information Administration, chartered PSWAC to provide advice and recommendations on the requirements for public safety communications.

[47] *Id,* at ¶ 76, emphasis added.

[48] *The 4.9 GHz Band Transferred from Federal Government Use, WT Docket No. 00-32,* Memorandum Opinion and Order and Third Report and Order, 18 FCC Rcd 9152, at ¶ 22 (2003), emphasis added.

[49] *Id.*

Commission. Even in the context of varied statutory or regulatory requirements, the underlying public policy objectives to protect public safety and ensure homeland security apply equally to all *CII Petitioners* and Metrolink. Having provided the railroad applicant the opportunity to have its application removed from the hearing proceeding, the Commission cannot lawful deny this same opportunity to the *CII Petitioners*.

IV. THE COMMISSION SHOULD GRANT *CII PETITIONERS'* APPLICATIONS IN THE PUBLIC INTEREST

The Commission should remove all of the *CII Petitioners'* applications from the hearing and promptly grant them in the public interest. Although the general policy, established in the context of broadcast applications, is that the Commission will not assign a license until issues relating to the underlying authorization are resolved,[50] that policy is not without exception where the public interest requires a transfer or assignment.[51] The Commission has the authority to

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[50] *See Jefferson Radio, Inc. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) ("*Jefferson*"); cf. *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981)("*Stereo Broadcasters, Inc.*"), *citing, Northland Television, Inc.*, 68 F.C.C.R 1566, 43 Rad. Reg. 2d (P & F) 1567 (1978) for the proposition that permitting a licensee to evade the consequences of alleged or adjudicated misconduct by transferring its interest or assigning its license will diminish the deterrent effect that revocation or renewal proceedings should have on licensees and will allow them to benefit despite their course of conduct. *See also Northwestern Indiana Broadcasting Corp.*, 60 FCC 2d 205, 209-10 (1976).

[51] *See, e.g.*, Second Thursday Corp., *Memorandum Opinion and Order*, 22 FCC 2d 515 (1970), recon. granted, Memorandum Opinion and Order, 25 FCC 2d 112 (1970) (to harmonize policies of federal bankruptcy law with those of the Communications Act, a grant without hearing of applications by applicant with qualifications issues may be made if the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors); *Hertz Broadcasting of Birmingham, Inc.*, Memorandum Opinion and Order, 57 FCC 2d 183, 184-85 (1976) (evidentiary hearing terminated on basis of principal's disabling illness; station sale permitted for no profit); and *Lois I. Pingree*, Memorandum Opinion and Order, 69 FCC 2d 2179, 2183-84 (1978) (no-profit sale permitted where disability provides mitigation for wrongdoing).

allow the assignment of a license even when, as here, an enforcement action continues against an existing licensee.[52]

In the context of non-broadcast licenses, the Commission has recognized that "deferral of all actions on all of the licenses held by a multiple licensee pending a final resolution of character issues raised by alleged misconduct may operate to the detriment of the public interest."[53] That is precisely the case here.

The decision of whether to approve a license transfer "turns upon a balancing of the public interest considerations favoring the free transferability of the licensee's interest against the Commission's long-term interest in deterrence to determine whether, on the whole, the public interest weighs in favor of free transferability."[54] The Commission has found that the weight for allowing free transferability of licenses is greater in the non-broadcast context (such as exists here) than in the broadcast context:

> In view of these significant differences between broadcast and nonbroadcast services, we believe that no valid purpose would be served here by applying our broadcast policy of prohibiting

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[52] *Cellular System One of Tulsa*, Memorandum Opinion and Order, 102 FCC 2d 86, at ¶¶ 9-10 (1985) ("*Cellular System One of Tulsa*"); *Little Rock Radio Telephone Company, Inc.*, Memorandum Opinion and Order, 89 F.C.C. 2d 400, at ¶¶21-22 (1982).

[53] *Cellular System One of Tulsa*, at ¶8 (1985). "An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Otis L. Hale d/b/a Mobilfone Communications*, Order to Show Cause and Memorandum Opinion and Order Designating Applications for Hearing, 1985 FCC LEXIS 2389, at ¶13 ("Mobilfone") *citing Haney v. Chaney*, 470 US 821, 831 (1985). In Mobilfone, applying Supreme Court precedent, the Commission upheld the Common Carrier Bureau's initial decision not to initiate enforcement action against certain licenses of Mobilfone, even as other licenses were being designated for hearing.

[54] *Cellular System One of Tulsa*, at ¶8. Applying this balancing test in allowing the transfer of a cellular license interest, the Commission concluded, "we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems." *Id.*, at ¶10

> transfers when there are outstanding character issues to be resolved against the transferor. The facts in this case reveal clearly that no harm to the public will occur by excepting these applications from our normal policy and, that, to the contrary, the public interest will be served by a transfer of these facilities to a qualified applicant .... Thus, we will allow the transfer.[55]

Applying this balancing test, the *CII Petitioners'* applications should be promptly granted. As discussed above, this spectrum is urgently needed by electric utilities and oil and gas companies pursuant to federal mandate for use in emergencies and other situations involving the protection of life and property. Yet while the benefit to the individual *CII Petitioners* and the public in the respective service areas will be great, the total amount of spectrum to be assigned is but a fragment of Maritime's larger geographic and site-specific licenses.[56] The Commission will retain strong enforcement leverage over Maritime because the great bulk of its licenses will remain at risk pending the outcome of the hearing. Moreover, as shown below, Maritime will not benefit from immediate grant of the assignment applications.

V. THE COMMISSION CAN PROHIBIT UNJUST ENRICHMENT DURING THE PENDENCY OF THE HEARING

The Commission's policy of prohibiting the assignment of licenses by a licensee whose qualifications are under investigation is grounded, in part, on the Commission's determination that any licensee whose qualifications are in doubt should not be allowed to benefit or be

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[55] *Applications of Cablecom-General, Inc.*, 87 FCC2d 784, 790-791 (1981). (Allowing a transfer of control involving applications in several non-broadcast services including the Cable Television Relay Service (CARS); point-to-point common carrier microwave radio service; and the satellite communications service.)

[56] According to the FCC's database, Maritime currently holds 71 active FCC licenses under its FCC Registration Number 0013587779. Four of these licenses (WQGF315, WQGF316, WQGF317 and WQGF318) are area-wide licenses Maritime acquired at auction. These AMTS licenses cover the Mid-Atlantic, Mississippi River, Great Lakes and Southern Pacific Regions. This is in addition to dozens of site-based licenses currently held by Maritime.

unjustly enriched by receiving payment for a transaction in which it assigns such licenses to a third party.[57]

To ensure unjust enrichment does not result in the instant case, upon grant of the assignment applications the *CII Petitioners* will take whatever action the Commission deems necessary and appropriate with respect to payment of any funds required in their agreements with Maritime. Maritime and *CII Petitioners* are committed to assuring that any consummation of their individual transactions conform to Commission policy and precedent. To that end, Maritime and *CII Petitioners* have agreed to restructure the payment aspect of their individual transactions as necessary to insure that each transaction conforms to the Commission's policy that granting an assignment application not result in any direct benefit to an allegedly unqualified assignor.[58]

These steps could include placing the funds into an independent, third-party escrow account to be held until final determination is made regarding Maritime's qualifications to remain a licensee.[59] The escrowed funds could be released to Maritime if it is ultimately found qualified to retain the captioned licenses. If Maritime's licenses are revoked, the escrowed funds could be paid into the U.S. Treasury. To the extent that the Commission imposes these or other

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[57] *See Jefferson* 340 F.2d at 783 (D.C. Cir. 1964); cf. *Stereo Broadcasters* 652 F.2d at 1027, *citing, Northland Television, Inc.*, 68 F.C.C.R 1566, 43 Rad. Reg. 2d (P & F) 1567 (1978). *See also Northwestern Indiana Broadcasting Corp.*, 60 FCC 2d 205, 209-10 (1976).

[58] *See, e.g., Harry O'Connor,* 2 FCC 2d 45 (1965); *Second Thursday Corp.*, 22 FCC 2d 515 (1970).

[59] In similar circumstances, the Commission has allowed the escrowing of funds pending resolution of proceedings involving a licensee's status. *See, e.g., Mid-Ohio Communications, Inc.*, 90 FCC 2d 114, 117-18 (1982); *James R. Reese et al.*, 38 FCC 2d 293, 294 (Rev. Bd. 1972).

reasonable safeguards, the *CII Petitioners* and Maritime will take appropriate steps to seek to satisfy those requirements.

The *CII Petitioners* and Maritime are committed to restructure the payment aspect of their transactions as necessary to insure that it confirms to the principle that the proposed assignments will not result in any direct benefit to the allegedly unqualified assignor/licensee.

VI. CONCLUSION

The *CII Petitioners* urge the Commission to reconsider its decision and offer them the same opportunity afforded to Metrolink to remove their applications from the ambit of the HDO.[60] As demonstrated in this Petition, federal mandates, potential safety of life considerations and the public interest necessitate the *CII Petitioners'* applications be granted without further delay.

There will be no benefit bestowed upon Maritime under the approach outlined in this Petition. Rather, upon grant, any funds due Maritime will be paid into escrow pending the outcome of the hearing. The escrow agreement will expressly prohibit disbursements to Maritime or its owner.

At the same time, grant of the *CII Petitioners'* applications will provide critical infrastructure entities with spectrum urgently needed to continue offering core energy services, especially in times of emergency and other events affecting the safety of life and property. Under these circumstances, the public interest demands that the Commission authorize the immediate assignment of the partitioned licenses to the *CII Petitioners*.

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[60] *Id* at *fn* 7.

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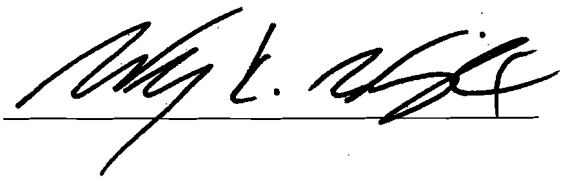
May 19, 2011
Attachments: Certificate of Service

CERTIFICATE OF SERVICE

I, Wesley K. Wright, hereby certify that on this 19th day of May, 2011, a copy of the foregoing Petition for Reconsideration was filed with the Commission, transmitted to the Office of Administrative Law Judges via fax number (202) 418-0195 and served on the parties listed below via First Class U.S. Mail.



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